

Fond du Lac Band of Lake Superior Chippewa

Reservation Business Committee

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June 15, 2017



Ajit Pai, Chairman
Mignon L. Clyburn, Commissioner
Michael O'Rielly, Commissioner
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Chairman
Kevin R. Dupuis, Sr.
Secretary/Treasurer
Ferdinand Martineau, Jr.

Re: Comments on WT Docket No. 17-79
Accelerating Wireless Broadband Deployment by Removing Barriers to
Infrastructure Investment

Dist. I Representative
Vanessa L. Northrup

Dear Chairman Pai and Commissioners Clyburn and O'Rielly:

Dist. II Representative
Bruce M. Savage

Dist. III Representative
Roger M. Smith, Sr.

Executive Director,
Tribal Programs
Chuck Walt

The Fond du Lac Band of Lake Superior Chippewa submits these comments in response to the Federal Communication Commission's Notice of Proposed Rulemaking ("NPRM") entitled "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment," 82 Fed. Reg. 21,761 (May 10, 2017). We join in the comments that were submitted to the FCC by the National Congress of American Indians, United South and Eastern Tribes, and National Association of Tribal Historic Preservation Officers. We submit these comments to bring to the FCC's attention several additional points regarding our experience with, and concerns about, the issues raised by the NPRM.

The Fond du Lac Band of Lake Superior Chippewa is a federally-recognized Indian tribe. We occupy a small Reservation in rural northeastern Minnesota located approximately 130 miles north of Minneapolis-St. Paul and 20 miles southwest of Duluth. We provide a full range of governmental services to the residents of our Reservation as well as the Indian people living near to our Reservation. Our Reservation is a small part of our aboriginal territory which extended throughout the northeastern part of Minnesota and around Lake Superior—territory that was recognized by the United States as our land in Treaties made with us.

We are deeply troubled by the assumption contained in the NPRM that compliance with federal law regarding the protection of historic, religious and sacred sites is a barrier to development of wireless broadband infrastructure. We support the development of wireless broadband but believe that broadband infrastructure can be built cost-effectively while also fully consulting with Indian tribes in order to comply with the federal laws that protect historic sites that have cultural and religious significance to Indian tribes.

Because of our own experience, we recognize the importance of developing wireless broadband infrastructure. As you know, Indian country is the most under-served area with regard to telecommunications, including broadband. The cost of providing such services to rural communities on Indian reservations, combined with the high rates of poverty and unemployment in Indian country, have created real barriers to such services. We face those barriers. While we have secured broadband access for our tribal offices, school, clinic and other government facilities, the communities living on the extreme northern and southern parts of our Reservation have no internet access. We are working to remedy this so that we are able to secure effective telecommunications throughout our Reservation—but much still needs to be done.

However, construction of such infrastructure must be done with respect for other rights and interests in the land. This includes protecting historic sites that have cultural or religious significance to Tribes, the protection of which is not a barrier to development. We do this whenever we build infrastructure on our own lands.

The importance of protecting such sites is recognized and confirmed by section 106 of the National Historic Preservation Act (NHPA). The important role and expertise that Indian tribes and Indian people have with regard to the identification of sites that are sacred or culturally important, is further confirmed by 1992 amendments to this statute. Those amendments expressly recognize that historic property to which an Indian tribe attaches religious and cultural significance may be eligible for listing in the National Register of Historic Places, and further obligated all federal agencies, including the FCC, to consult with any Tribe that attaches religious and cultural significance to historic properties that may be affected by a federal or federally-assisted undertaking. 54 U.S.C. § 302706(a), (b); 36 C.F.R. § 800.2(c)(2)(ii). The FCC's duty to consult Tribes applies throughout the NHPA process and "regardless of the location of the historic properties"—whether those properties are located within or outside of a Tribe's reservation. 36 C.F.R. § 800.2(c)(2)(ii).

The measures that have been developed by the FCC in consultation with Tribes to establish the Tower Construction Notification System (TCNS) is an important tool that already serves to streamline the NHPA process. That system strikes a proper balance between the interests in development with the importance of respect for historic sites that have religious and cultural significance to Indian tribes, and helps fulfill the FCC's trust responsibility to tribes on these important issues.

The Fond du Lac Band's Tribal Historic Preservation Office (THPO) receives and reviews the notices provided under the TCNS process, and regularly checks with and responds on the TCNS website. Our THPO has found that the TCNS system allows her to quickly assess whether proposed projects might require a Tribal cultural resource survey or monitoring. She has seen that most proposed projects are small cell builds where the project will simply upgrade the equipment on the existing tower without breaking ground and which, as a result, does not trigger the need for a tribal cultural resource survey or monitoring. However, if the proposed project involves construction of a new tower, or other ground disturbances, our THPO will assess this in light of the information that we have about cultural resources and sacred sites to determine if further surveys or monitoring are needed. The TCNS process is working.

The NPRM states that many wireless providers expressed concern that the work done by Tribes in cultural resources surveys and monitoring leads to substantial delays in deployment, and the fees charged by some Tribes to do such work have become “exorbitant.” We seriously question whether this is, in fact, the case. If delays arise, it is often because the project applicant did not timely contact the Tribe, or did not provide the Tribe with sufficient information to assess the impacts of the proposed project. As to costs for tribal surveys, the Tribes have the expertise necessary to do this work. And as with any government providing a service, the Tribes are entitled to charge a reasonable fee for the costs of their work. Project proponents seeking to develop infrastructure readily pay for the work of archeologists and historians to comply with federal and state laws, and there is no reason to treat tribal experts differently. If there are problems with alleged “exorbitant” fees, those issues should be addressed on a case-by-case basis. And the FCC might consider engaging officials at the Advisory Council on Historic Preservation to assist, if such issues do arise.

The Band opposes proposals that would modify the existing rules and procedures. In particular, we oppose proposals that would allow project applicants to “self-certify” that they have complied with Section 106, as project applicants completely lack the expertise to identify sites that have cultural or religious significance to tribes. And the law does not permit the FCC to delegate its responsibilities under Section 106 to the industry it is required to regulate. We also object to any change in the rules that would exclude collocations from section 106 review. As described above, our THPO is able to quickly review these to assess whether further section 106 review is needed. For the same reason, we object to proposed rules that would exclude from section 106 review, transportation easements, or which would require tribes to affirmatively certify, in advance, geographical areas of interest, as tribal history, which included migration and removal, do not lend themselves to such certifications.

Finally, efforts to bypass Tribes in the Section 106 process are not only contrary to the law, but are, in fact, short-sighted. Early and meaningful consultation with Tribes on NHPA issues is the best way to avoid unanticipated discoveries that may occur during construction, resulting in far greater costs and delays. By knowing at the outset whether proposed construction of a tower might damage a burial site or sacred place, the company can make small changes to the proposed siting for the project well before the company commits financial resources and construction begins. This is far more cost-effective than if, after construction is underway, burial remains are found, the construction forced to stop, and the tower relocated.

We have seen these problems arise when an entity building an infrastructure project failed to consult with tribes. This has now occurred twice with the Minnesota Department of Transportation. Just two weeks ago, while in the middle of constructing a \$2.7 million road project in what is known as the Fond du Lac neighborhood in the City of Duluth, the Minnesota DOT unearthed human remains. These lie within a known historic Fond du Lac settlement and cemetery. As soon as the remains were unearthed, construction stopped and the project is in violation of several state laws. The Fond du Lac Band was never consulted about this project by the Minnesota DOT, the City of Duluth, or the U.S. Army Corps of Engineers, each of which has a role in reviewing and permitting the project. Had the Band been consulted, measures could have been taken to properly survey this sacred site and avoid desecrating it.

All work on construction of this road is now suspended indefinitely while a full historical and archeological investigation is being done. The time it will take to complete the investigation and the costs associated with the recovery of the human remains is unknown, as are the costs arising from the delay of the road construction itself. A similar incident occurred two years ago in November 2015, where construction on another road (in Hennepin County) desecrated a cemetery which, had a proper investigation been done, could easily have been identified and avoided. Indeed, the location of that Indian burial site had been mapped and was of record since 1883. The damage done there required a full archeological investigation, which, after two years, is still not complete.

Our point is very simple. Federal law protects historic sites and those that have religious and cultural significance to tribes. Federal law does this by requiring consultation with Tribes, who are in the best position to provide expertise in identifying such sites so that they might be avoided. Early and meaningful consultation with tribes on historic sites that have religious and cultural significance to Indian tribes is the most effective way to reduce costs and delays and streamline infrastructure development.

Thank you for the opportunity to provide comments on this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "B. Savage".

Bruce M. Savage
Vice-Chairman